BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MEGAN D. McLAUGHLIN Claimant VS. **DUCOMMUN INCORPORATED** Respondent AND **TRAVELERS CASUALTY & SURETY CO.** Insurance Carrier	)	Docket No. 1,049,335

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the September 14, 2012, Award entered by Special Administrative Law Judge John C. Nodgaard. The Board heard oral argument on February 13, 2013. The Director appointed E.L. Lee Kinch to serve as Appeals Board Member Pro Tem in place of recused Board Member John F. Carpinelli. William L. Phalen, of Pittsburg, Kansas, appeared for claimant. Sylvia B. Penner, of Wichita, Kansas, appeared for respondent.

The Special Administrative Law Judge (SALJ) found that this case should be treated as an occupational disease case and awarded claimant a 5 percent permanent partial impairment to the body as a whole. The SALJ further found claimant is entitled to a work disability and has a 36.4 percent task loss. Based upon an average weekly wage of $617.87, the SALJ found claimant had a 100 percent wage loss for the period from February 10 to June 30, 2010; an 88 percent wage loss for the period of July 1, 2010, to February 28, 2011; a 100 percent wage loss for the period from March 1, 2011, to November 20, 2011; and a 65 percent wage loss from November 21, 2011, and ongoing.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Respondent asks the Board to reverse the SALJ's Award and find workers compensation benefits should be denied to claimant because she failed to prove she met with personal injury by accident each and every day from September 14, 2009, through February 14, 2010. In the event the Board finds claimant met with a work-related injury, respondent requests the Board find claimant has no permanent impairment as a result of her alleged work injuries and is not entitled to an award of permanent disability.

Claimant contends she met with personal injury by accident while working at respondent and is entitled to a 10 percent functional disability as well as a work disability. Claimant asks the Board to modify the opinion and find she has an average weekly wage of $764.30, which includes her fringe benefits.

The issues for the Board's review are:

(1) Did claimant meet with personal injury by accident each and every working day from September 14, 2009, through February 14, 2010, arising out of and in the course of her employment?

(2) Did claimant suffer permanent impairment as a result of her alleged work injuries? If so, what is the nature and extent of her disability?

FINDINGS OF FACT

Claimant started working for respondent in September 2006 as a chemical mill operator. As such, her primary duty was to prep titanium parts, dip the parts into an acid tank and a rinse tank, and then remove the racks of parts and check for specifications of the customer. Claimant said she would also spray parts with maskant. The job description of a chemical mill operator states the employee would be "[f]requently exposed to wet and/or humid conditions, fumes or airborne particles, toxic or caustic chemicals."[1] Claimant identified some of the chemicals she worked around as tetrachloroethylene, hydrofluoric acid and formaldehyde.

When spraying parts, claimant wore personal protective equipment (PPE) that included a full body suit and a hooded mask that covered the head, and gloves. The hooded mask was hooked up to an oxygen tank. Claimant identified the chemical being used when spraying as tetrachloroethylene. Spraying was done in a three-sided booth that was open to the other parts of the building. Claimant said after spraying racks of parts, she would have to take off her hooded mask in order to push the racks out to another area to dry and pull more racks into the spray booth. She testified there would still be chemicals

[1] R.H. Trans., Cl. Ex. 3 at 2.

in the air when she took off her hooded mask. The spray booth has a fiber particle filtration system, which claimant said was frequently clogged and was not big enough.

> Q. [respondent's attorney] . . . Do you have any actual evidence or are you just guessing that the filters aren't big enough?
> A. [claimant] I know from having the chemicals constantly in the air that it wasn't filtering as it should.
> Q. Did you test the air quality to know that it wasn't filtering as it should?
> A. No.
> Q. And you've never been privy to any air quality testing results that were performed of the air located in the Ducommun areas that you just described.
> A. Correct.[2]

When claimant worked the line, she would dip titanium parts into a tank of hydrofluoric and nitric acid. When she pulled the parts out of the tank, she said fumes would be emitted into the air, creating a vapor cloud that hung in the work area. Claimant would not be wearing PPE when working this line. Claimant said when doing either the spraying job or the dipping job, she could taste and smell the chemicals, and the chemicals would get on her skin.

Claimant initially noticed symptoms when she started working for respondent in September 2006.[3] Her symptoms included shortness of breath, upper respiratory problems, eye problems and skin problems. Claimant testified she reported her problems to respondent's safety person.[4] She said the safety person told her respondent had done tests and the chemicals were not causing any problems. Claimant then sought medical treatment on her own from Lindsey Kloer, a physician assistant. Claimant said after about a year and a half, she asked to be transferred out of the chemical mill operator job because of her symptoms. She was placed in a job as an expediter. However, in September 2009, respondent underwent a reduction in force and claimant was required to return to the position as a chemical mill operator in order to keep her job.

When claimant returned to the job as a chemical mill operator in September 2009, her shortness of breath and upper respiratory problems got worse. She also started developing other symptoms, including dizziness, sore throat, hoarseness, extreme headaches, eye sensitivity, and blotching of her skin. Claimant reported the problems to respondent's human resources person, but respondent refused to provide her with medical treatment. Claimant reported her problem to Robert Nolop, claimant's safety manager.

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[2] R.H. Depo. of Claimant (Feb. 3, 2012) at 29.

[3] Claimant's Application for Hearing, filed February 5, 2010, claims injuries each and every working day beginning September 14, 2009, and continuing.

[4] Respondent's current safety manager is Robert Nolop, who testified in April 2012 that he had been safety manager for five and one/half years. It is unknown who respondent's safety manager was in 2006.

She testified Mr. Nolop did not offer to send her to a doctor but, instead, suggested her symptoms may have developed because of one of her farm animals. Claimant again saw Ms. Kloer, the physician assistant, and was treated with an inhaler for her breathing problems and different creams for her red, blotchy skin.

Claimant also claimed her work created problems with her eyes. She wore contacts while working and claimed chemicals were being absorbed into her contacts, causing the contacts to irritate the top of her eyelids and scratch her eyes. Claimant said she later found out that an individual should never wear contacts around the chemicals. Claimant was seen by Dr. Keith Mallatt, an optometrist, and eventually had eye surgery because she was no longer able to wear contacts. Claimant testified she was not a candidate for LASIK surgery and had to have a different kind of surgery on her eyes. But she agreed that Dr. Mallatt's report of January 29, 2009, indicated she was determined to be a LASIK candidate and she had surgery on her left eye on February 2, 2009, and on her right eye on April 24, 2009.[5] Claimant paid for the LASIK surgeries on her own, because it is elective surgery. Claimant, nevertheless, claims her LASIK surgeries were related to her employment.

Mr. Nolop testified concerning respondent's ventilation and air scrubbers. He denied the air filtration in the spray booth was clogged or too small, saying when the gauge installed on the spray booth reaches .30, the filter is replaced. Employees are trained how to change the filter. He introduced as an exhibit a photograph showing the air flowing through the spray booth was 3335 feet per minute, more than the OSHA standard of 200 feet per minute. Another photograph of an airflow meter showed the air scrubber was functioning and drawing 835 feet per minute, more than four times OSHA's requirement of 200 feet per minute. Mr. Nolop denied claimant would have had to remove her hooded mask to move around in the spray booth. He said when the parts are sprayed, they are allowed to flash off, meaning the chemical used to transport the solid that makes contact with the part dries off and the chemical evaporates. The parts are then ready to be moved to the oven. At that point, claimant would have been able to remove her mask in safety. Mr. Nolop also said the substance rising from the rinse tanks is steam. He did not know the chemical content of the steam, however.

Mr. Nolop denied claimant was moved from her job as a chemical mill operator to that of an expediter in the production control office because of complaints about her work environment. Mr. Nolop said he heard from claimant that she rotated from the job as a chemical mill operator to the production control office because she wanted to further her career in the company.

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[5] These surgeries were performed during the time claimant worked as an expediter, before September 2009.

Mr. Nolop testified claimant was a member of respondent's safety team from January through December 2009. The team met twice a month. At no time during claimant's term on the team did she raise any concerns about the ventilation system, air quality, or the PPE. Mr. Nolop also said OSHA performed an inspection at respondent in September 2009, and there were no findings in the chemical mill/clean line area.

Mr. Nolop first heard claimant was alleging injury as a result of her work at respondent in December 2009. He asked claimant if she wanted to make a workers compensation claim. Claimant told him she had skin problems because of working at respondent. In the conversation, Mr. Nolop asked claimant if anything else could have caused her acne, such as her farm animals, and claimant walked away.

Dr. Pedro Murati is board certified in physical medicine, rehabilitation, electrodiagnosis and independent medical examinations. Dr. Murati said as a rehabilitation doctor, he treated people with pulmonary conditions. He has not done so, however, in many years, but he did receive the training. He said he has expertise with respect to the rehabilitation process of diseases to the lungs. Dr. Murati examined claimant on two occasions, both at the request of claimant's attorney.

Dr. Murati first examined claimant on February 25, 2010. Claimant's chief complaints were that she could not be around any chemicals, shortness of breath, dizziness, upper respiratory infection, sore throat, thick mucus and red patches on her face, which she noticed after starting work for respondent. Dr. Murati performed a pulmonary examination, which was clear to auscultation and percussion. No rails or wheezing were present. Dr. Murati diagnosed claimant with an apparent allergic reaction and bronchitis. He recommended claimant work as tolerated and use common sense. He opined that claimant's diagnoses were within all reasonable medical probability a direct result from the work-related injury that occurred on September 14, 2009, and each and every working day thereafter. Dr. Murati recommended a consultation with an allergist and a pulmonologist. He strongly recommended she discontinue working with the chemicals used at her work.

Dr. Murati examined claimant a second time on May 25, 2011. Claimant complained she could not be around any chemicals, had red patches on her face occasionally, dry eyes all the time, and shortness of breath, dizziness, upper respiratory infection and sore throat. Claimant said the symptoms have all subsided unless she is around chemicals. Claimant told Dr. Murati that because of being around chemicals, her contacts dried out and her eyelids were scratched, scarring her eyes. She reports she had to wear glasses and had surgery by Dr. Mallatt to avoid wearing them.

Dr. Murati again performed a pulmonary study, which was revealed to be clear to auscultation and percussion. There were no rails or wheezing present. Dr. Murati found claimant had a healing rash at the right maxillary region and chin; her left maxillary region was not as severe. Dr. Murati diagnosed claimant with reactive airway disease and facial

skin rashes. He opined that claimant's diagnoses were caused or permanently aggravated by her work at respondent each and every working day through February 14, 2010.

Dr. Murati reviewed a copy of the job description of a chemical operator at respondent which indicated that the worker would be frequently exposed to wet and/or humid conditions, fumes or airborne particles, toxic or caustic chemicals. Dr. Murati said the job description was documentation of exposure to chemicals at work. Dr. Murati also reviewed the Material Safety Data Sheets (MSDS) for tetrachlorethylene and hydrofluoric acid. Dr. Murati said tetrachlorethylene is a hydrocarbon and "you don't want this stuff on your skin or breathing it in"[6] because, as is stated in the MSDS, prolonged skin contact may defat the skin and produce dermatitis. The MSDS states one should avoid breathing vapors or mists and that it may cause irritation to the respiratory tract. Inhalation of high vapor concentrations may cause symptoms such as headache, dizziness, tiredness, nausea and vomiting. The MSDS relates that prolonged exposure through inhalation could aggravate dermatitis and asthma. Overexposure could result in irreversible respiratory disease and respiratory tract damage. Dr. Murati said hydrofluoric acid is very dangerous. The MSDS sheet for hydrofluoric acid indicates inhalation after prolonged exposure would cause problems with the respiratory system and eyes.

Dr. Murati said claimant had no shortness of breath when he examined her. He saw no evidence that she was experiencing dizziness. Dr. Murati saw no evidence of red patches on claimant's face on February 25, 2010. Dr. Murati conducted a pulmonary examination, and all findings were negative. Dr. Murati said the AMA *Guides*[7] recognize that pulmonary function studies may be normal or near normal between attacks of breathing difficulty and that impairment can exist from chemical exposures at work. Dr. Murati said just because an employee has normal pulmonary functions does not mean he or she has no impairment. While the chemical is absent, an employee could have normal skin and lungs. Dr. Murati said claimant has impairment because her system is such now that it is triggered when she is exposed to chemicals and she has difficulty breathing and the skin rash appears on her face.

Using the AMA *Guides*, Dr. Murati assessed a 5 percent whole person impairment for the lungs and a 5 percent whole person impairment for the skin rash, which combine for a 10 percent whole person impairment. Dr. Murati said claimant should avoid chemicals, solvents, dust, and organic fumes. He reviewed the task list prepared by Karen Terrill;[8] and

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[6] Murati Depo. at 20.

[7] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[8] Karen Terrill, a rehabilitation consultant, interviewed claimant by telephone on July 27, 2011, at the request of claimant's attorney. She prepared a list of 39 tasks that claimant performed in the 15-year period before her work-related accident.

of the 39 unduplicated tasks on the list, he opined claimant is unable to perform 33 for an 85 percent task loss.

Dr. John Nelson is board certified in internal medicine, pulmonary disease and sleep medicine. He does diagnostic testing, administers medications, and follows up for the medical treatment of lung disease. Dr. Nelson is the medical director of the intensive care unit, medical director of respiratory therapy, medical director of pulmonary rehabilitation, and medical director of the sleep lab at Overland Park Regional Medical Center.

Dr. Nelson performed an independent medical examination of claimant on February 8, 2011, at the request of respondent. Claimant told Dr. Nelson she began work for respondent in September 2006, performing chemical milling. She used chemicals to etch titanium, including tetrachloroethylene, hydrogen fluoride, and nitric acid. Claimant told Dr. Nelson the fumes were very strong and she noticed clouds of fumes during processing. Claimant reported that while working for respondent she began to experience airway irritation, congestion of her nasal passages and throat, stuffiness of her nose, excessive mucous, headache, nausea, dizziness, a drunk feeling, and paroxysms of coughing. Claimant felt as if she had a constant cold. After two and one/half years, claimant transferred out of that work area, but she returned a year later, in September 2009. She was unable to continue because of a recurrence of her symptoms and left her employment in February 2010. Claimant told Dr. Nelson she is better but is still sensitive to fumes, sprays and cool air. Claimant has episodic chest congestion, throat congestion, voice changes, and shortness of breath if she works vigorously or walks fast. She has been diagnosed with asthma and uses an inhaler.

Dr. Nelson testified that tetrachloroethylene, hydrogen fluoride, and nitric acid are all acidic and can cause airway burns when dissolved in airway mucous, especially hydrogen fluoride and nitric acid. Claimant said she had inhaled these chemicals; she did not tell him respondent provided her with protective gear. Dr. Nelson said he could not verify the equipment provided to claimant was adequate to prevent her from having inhalant exposure.

Claimant was not exhibiting any of the symptoms she described at the time of Dr. Nelson's examination. Claimant did not complain to Dr. Nelson about a rash. Dr. Nelson said claimant's pulmonary examination was normal. After his examination and testing, Dr. Nelson opined claimant had a toxic event from inhaled gas fumes or vapors and diagnosed her with multiple chemical hypersensitivity syndrome. Because of her history and pulmonary functions, Dr. Nelson did not expect claimant to have long-term sequelae as long as she kept out of the workplace. Based on the AMA *Guides*, Dr. Nelson rated claimant as having a 0 percent permanent impairment due to pulmonary dysfunction.

Dr. Nelson reviewed a task list prepared by Steve Benjamin.[9] Of the 44 tasks listed, Dr. Nelson opined claimant was unable to perform 16 for a 36 percent task loss. The only caveat Dr. Nelson put on claimant was to avoid working in a workplace environment where similar exposures might be anticipated. As far as any physical limitations, he did not identify any.

Claimant's last date of employment with respondent was February 14, 2010. She applied for FMLA and said she did not go back to work for respondent when those benefits ended. Claimant was out of work until July 2010. At that time, she started working one day a week at Parsons Stockyard, earning $75 per day. She worked until March 2011. She remained unemployed again until November 21, 2011, when she started working at KOAM, a television station in Pittsburg, Kansas. Her job at KOAM is part time. She works 29 hours per week and earns $7.50 per hour.

Claimant continues to have problems around chemicals. She tries to avoid chemical exposure but has had problems since leaving respondent's employment. She gave an example of a time she breathed in fumes associated with bug spray, exacerbating her symptoms. She also described an incident where she breathed in fumes from a generator and had to use her inhaler twice and then had to leave work. She still gets red blotches on her face.

PRINCIPLES OF LAW

In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends.[10]

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[11]

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[12] Whether

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[9] Steve Benjamin is a vocational rehabilitation consultant. He interviewed claimant by telephone on January 16, 2012, at the request of respondent, and compiled a list of 44 tasks that she performed in the 15-year period before her accident.

[10] K.S.A. 2009 Supp. 44-501(a).

[11] K.S.A. 2009 Supp. 44-508(g).

[12] K.S.A. 2009 Supp. 44-501(a).

an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[13]

The two phrases arising "out of" and "in the course of" employment have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowed. The phrase “arising out of” employment, points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises out of the employment when there is, apparent to the rational mind, a causal connection between the condition under which the work is required to be performed and the resulting injury.[14]

> The phrase “out of” employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises “out of” employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises “out of” employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase “in the course of” employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.

K.S.A. 44-5a01(b) states in part:

> “Occupational disease” shall mean only a disease arising out of and in the course of the employment resulting from the nature of the employment in which the employee was engaged under such employer, and which was actually contracted while so engaged. “Nature of the employment” shall mean, for purposes of this section, that to the occupation, trade or employment in which the employee was engaged, there is attached a particular and peculiar hazard of such disease which distinguishes the employment from other occupations and employments, and which creates a hazard of such disease which is in excess of the hazard of such disease in general. The disease must appear to have had its origin in a special risk of such disease connected with the particular type of employment and to have resulted from that source as a reasonable consequence of the risk. Ordinary diseases of life and conditions to which the general public is or may be exposed to outside of the particular employment, and hazards of diseases and conditions attending employment in general, shall not be compensable as occupational diseases.

K.S.A. 44-5a01(d) states:

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[13] *Kindel v. Ferco Rental, Inc.,* 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[14] *Newman v. Bennett,* 212 Kan. 562, 512 P.2d 497 (1973).

> Where an occupational disease is aggravated by any disease or infirmity, not itself compensable, or where disability or death from any other cause, not itself compensable, is aggravated, prolonged, accelerated or in any wise contributed to by an occupational disease, the compensation payable shall be reduced and limited to such proportion only of the compensation that would be payable if the occupational disease were the sole cause of the disability or death, as such occupational disease, as a causative factor, bears to all the causes of such disability or death, such reduction in compensation to be effected by reducing the number of weekly or monthly payments or the amounts of such payments, as under the circumstances of the particular case may be for the best interest of the claimant or claimants.

K.S.A. 44-5a06 states in part:

> The date when an employee or workman becomes incapacitated by an occupational disease from performing his work in the last occupation in which he was injuriously exposed to the hazards of such disease, shall be taken as the date of the injury equivalent to the date of accident under the workmen's compensation act. Where compensation is payable for an occupational disease, the employer in whose employment the employee or workman was last injuriously exposed to the hazards of such disease, and the insurance carrier, if any, on the risk when such employee was last so exposed under such employer, shall be liable therefor, without the right to contribution from any prior employer or insurance carrier; the amount of the compensation shall be based upon the average wages of the employee or workman when last so exposed under such employer, and the notice of disability and claim for compensation, as hereinafter required, shall be given and made to such employer.

K.S.A. 44-5a04(a) states:

> (a) Except as otherwise provided in this act "disablement" means the event of an employee becoming actually incapacitated, partially or totally, because of an occupational disease, from performing the employee's work in the last occupation in which injuriously exposed to the hazards of such disease, and "disability" means the state of being so incapacitated.

ANALYSIS

1. Injury Arising Out of and in the Course of Employment

Claimant testified that during her employment as a chemical millist, she was exposed to chemical vapors. While performing her duties, she developed dizziness, congestion, sore throat, hoarseness, extreme headaches and eye sensitivity. Because of the symptoms, claimant requested a different position, away from the chemical exposure.

Claimant was given a different position, and her symptoms subsided. Claimant returned to the chemical millist position in 2009, and the symptoms returned.

Respondent presented evidence that the work environment in which claimant was working was safe. Respondent's safety director testified the ventilation system was working properly in September 2009, and the air flow through the spray booth exceeded OSHA standards. Mr. Nolop testified that OSHA performed an inspection in September 2009 and found no issues in the "chem mill clean line area."[15] Notwithstanding the testimony regarding the safety measures, the job description placed into the record describes the "chem mill operator" position as a work environment where the employee is "[f]requently exposed to wet and/or humid conditions, fumes or airborne particles, toxic or caustic chemicals"[16]

This claim for disability is for the loss of claimant's ability to work due to sensitivities relating to pulmonary function when exposed to airborne irritants. Two physicians testified regarding this matter. Dr. Nelson is board certified in pulmonary diseases and is the Director of respiratory therapy and pulmonary rehabilitation at Overland Park Regional Medical Center. Dr. Murati specializes in treating chronic pain patients and is not board certified in any pulmonary-related field, nor does he treat patients for pulmonary disease on a regular basis. Based on the backgrounds and qualifications of the experts, the Board gives more weight to the opinions of Dr. Nelson regarding claimant's pulmonary condition.

Dr. Nelson opined that claimant had a toxic event from inhaled gas fumes or vapors and diagnosed her with multiple chemical hypersensitivity syndrome. Claimant did not tell Dr. Nelson that she wore protective gear. Dr. Neson testified that an inaccurate history might lead to an erroneous diagnosis. Dr. Nelson also testified there was no history of asthma in claimant's medical records. If claimant had asthma, his diagnosis would change from multiple chemical hypersensitivity syndrome to irritant exacerbation of asthma. In any event, Dr. Nelson's testimony supports that he would and did arrive at a final work-related diagnosis notwithstanding a history of asthma.

On cross-examination, claimant's counsel asked Dr. Nelson his opinion as to whether each individual symptom experienced by claimant was consistent with his diagnosis. Dr. Nelson agreed that each symptom individually and all of the symptoms collectively were consistent with chemical hypersensitivity syndrome. Dr. Nelson also agreed that claimant's description of symptoms was consistent with other cases of multiple chemical hypersensitivity syndrome he had treated in the past.

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[15] Nolop Depo. at 35.

[16] R.H. Trans., Cl. Ex. 3 at 2.

The Board finds that claimant suffers from multiple chemical hypersensitivity syndrome, an occupational disease, as the result of her employment with respondent as a chemical millist.

2. Impairment of Function

Respondent argues that if the Board finds claimant suffered an injury by accident arising out of her employment, claimant suffers from no impairment of function. Dr. Nelson's tests for pulmonary function were normal. Dr. Nelson opined that claimant suffered no permanent impairment, based upon the *AMA Guides*. When asked, Dr. Nelson agreed that his zero percent impairment rating was consistent with the normal pulmonary function tests. Dr. Murati assessed a 5 percent whole person impairment for claimant's lung condition. As it has been previously stated, the Board finds that Dr. Murati is not sufficiently qualified to treat or provide expert opinions regarding pulmonary issues. The Board finds that claimant suffered a zero percent impairment for loss of pulmonary function.

3. Task Loss

As claimant sustained an occupational disease, task loss is not a consideration in arriving at the final disability amount. As such, the issue of task loss will not be addressed by the Board.

4. Permanent Disablement

In an occupational disease case, permanent disablement is based on a claimant's ability to earn wages. The Kansas Supreme Court has provided guidance in this respect by stating:

> We held in *Knight v. Hudiburg-Smith Chevrolet, Olds., Inc.*, 200 Kan. 205, 209, 435 P.2d 3 (1967), that the term "disability," when attributable to occupational disease, relates to loss of earning capacity. See *Slack v. Thies Development Corp.*, 11 Kan. App. 2d 204, 718 P.2d 310, *rev. denied* 239 Kan. 694 (1986); 82 Am. Jur. 2d, Worker's Compensation § 380, p. 414.[17]

Based upon the language in *Burton*, the Board must review the record to determine what claimant is earning or capable of earning. Two vocational experts testified in this matter. Karen Terrill testified that claimant had a 100 percent wage loss due to the fact that she was unemployed at the time of the evaluation. Ms. Terrill did not address the issue of claimant's capacity to earn wages. Steven Benjamin wrote in his report that claimant was earning up to $217.50 at the time of his evaluation, but possessed the capacity to make $300.00 per week if she worked 40 hours per week.

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[17] *Burton v. Rockwell Int'l,* 266 Kan. 1, 7, 967 P.2d 290 (1998).

Based upon the limited evidence in the record concerning claimant's earning capacity, the Board finds that claimant is capable of earning $300.00 per week. At the time of the injury, claimant earned $764.30 per week. This amount is based upon the parties stipulation to a base wage of $617.87 and an additional $146.16 per week based upon claimant's testimony and the fringe benefit exhibit, which was placed into the record at the regular hearing without objection by respondent. Based upon claimant's current earning capacity compared to her pre-disablement wage, the Board finds that claimant suffers a 61 percent loss of earning capacity as the result of her disablement from an occupational disease.

K.S.A. 44-5a06 states:

> The date when an employee or workman becomes incapacitated by an occupational disease from performing his work in the last occupation in which he was injuriously exposed to the hazards of such disease, shall be taken as the date of the injury equivalent to the date of accident under the workmen's compensation act.

Claimant's last day working for respondent was February 14, 2010. Based upon the plain language of the statute, the Board finds that the date of disablement is February 14, 2010.

6. Skin Impairment

Claimant also alleges she developed a skin disorder as a result of her work activities with respondent. Claimant testified that chemicals from her job would get on her skin. She stated she would get blotching and redness of her skin. The only medical evidence presented relating to the skin disorder is the testimony of Dr. Murati. The record reflects that Dr. Murati first examined claimant on February 25, 2010, 11 days after claimant's last day working for respondent. While claimant gave a history of "red patches on face,"[18] Dr. Murati did not note any findings related to a skin rash in his report of the February 25, 2010, examination. Dr. Murati again examined claimant on May 25, 2011. At that time, more than a year after claimant stopped working for respondent, Dr. Murati found a "healing rash at the right maxillary region and chin."[19]

The SALJ acknowledged Dr. Murati's skin impairment rating in the Award. However, no permanent impairment was awarded for the skin disorder. In the conclusions of the Award, the SALJ found that claimant suffers from multiple chemical hypersensitivity syndrome and concluded that claimant had a 5 percent impairment to the body as a whole. There was no mention of skin impairment. Since the ALJ did not address the issue and

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[18] Murati Depo., Ex. 2 at 1.

[19] *Id.*, Ex. 3 at 2.

claimant did not appeal the SALJ's failure to address the issue, the Board will not address the issue of whether claimant suffers a permanent impairment for a skin disorder.

CONCLUSION

Based upon the foregoing the Board finds:

1. Claimant met the burden to prove that she suffers from an occupational disease arising out of and in the course of her work for respondent.

2. Claimant suffers a 61 percent disability due to disablement resulting from her occupational exposure to airborne irritants while working for respondent.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Special Administrative Law Judge John C. Nodgaard dated September 14, 2012, is modified to reflect that claimant suffers from a 61 percent disability as the result of a disablement resulting from an occupational disease. The Award is affirmed in all other respects.

As of March 14, 2013, there would be due and owing to the claimant 160.43 weeks of permanent partial disability compensation at the rate of $310.83 per week in the sum of $49,866.46 for a total due and owing of $49,866.46, which is ordered paid in one lump sum less amounts previously paid.

Thereafter, benefits shall be paid at the rate of $310.83 per week until claimant's disablement ends or the respondent has paid the statutory maximum benefit of $100.000.00.

IT IS SO ORDERED.

Dated this _____ day of March, 2013.

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BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

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John C. Nodgaard, Special Administrative Law Judge
Thomas Klein, Administrative Law Judge